Nos. 77-1643 and 77-6728

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In the Supreme Court of the United States

OCTOBER TERM, 1978

MARTIN WILLARD HOULTIN, PETITIONER

v.

UNITED STATES OF AMERICA

KENNETH B. PHILLIPS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals reversing petitioners' initial convictions (Pet. App. 28a-46a)[1] is reported at 525 F.2d 943. The subsequent opinion of the court of appeals affirming petitioners' convictions after retrial (Pet. App. 1a-26a) is reported at 566 F.2d 1027.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 1978, and a petition for rehearing was denied on April 10, 1978 (Pet. App. 27a). The petition for a writ of certiorari in No. 77-6728 was filed on May 10, 1978. The petition for a writ of certiorari in No. 77-1643 was filed on May 18, 1978, and is therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether retrial of petitioners following reversal of their convictions for trial error is barred by the Double Jeopardy Clause.

2. Whether the immunized testimony of four previously convicted co-defendants should have been excluded as the fruit of unlawful electronic surveillance.

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[1] "Pet. App." refers to the appendix to the petition in No. 77-1643.

STATEMENT

In an indictment filed in the United States District Court for the Western District of Texas, petitioners were charged with conspiracy to import approximately 2,260 pounds of marijuana, in violation of 21 U.S.C. 963, and conspiracy to possess the marijuana with intent to distribute it, in violation of 21 U.S.C. 846. Also indicted on the same charges were co-defendants Robert Earl Burke, Kenneth J. Croucher, Michael R. Francis, and Duane Byron Morrison.

1. The indictment resulted from a lengthy and intensive investigation of narcotics smuggling activities by petitioners and their co-defendants (Pet. App. 29a). In the course of that investigation, New Mexico law enforcement officials received state court authorization to intercept the telephone communications of petitioner Houltin and co-defendants Burke and Morrison (*ibid.*). Pursuant to that order, state law enforcement officers intercepted two telephone communications, one between petitioner Houltin and his wife, and one between Houltin's wife and petitioner Phillips' wife, who was speaking from Phillips' home.

Prior to trial, all of the defendants moved to suppress the evidence obtained as a result of those interceptions. The district court held that the wiretap authorization was improper but declined to suppress the marijuana seized at the time of the defendants' arrests, concluding that the arrests were not the

product of the unlawful interceptions (*id.* at 29a-30a).[2]

The evidence showed that petitioners participated in the clandestine importation of more than a ton of marijuana from Mexico into this country on October 12 and 13, 1973. Agents of the Drug Enforcement Administration and the United States Customs Service tracked three private aircraft from Columbus, New Mexico, across the border into Mexico on the afternoon of October 12. Airborne surveillance teams observed the three airplanes land in a dry lakebed in Mexico, meet a large van, and then return to New Mexico approximately twenty minutes later (III R. 87-92). When the airplanes arrived near Magdalena, New Mexico, at 9:30 p.m., one of the pilots radioed "ground support" to "turn on your flashers." The agents then saw a set of automobile emergency flashers blink on and off for a few seconds (*id.* at 93-96). Shortly thereafter, the automobile drove to another location and turned on its lights. The three airplanes then landed beside the automobile and took off again a few minutes later (*id.* at 98-99, 105).

New Mexico State Police subsequently arrested co-defendant Croucher at the spot where the aircraft had landed and found 2,260 pounds of marijuana in bags

[2] The district court concluded that the interceptions were unlawful because state authorities had failed to comply with 18 U.S.C. 2516(2), which requires that applications for wiretap authorization be made by the "principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof." The application for authorization in this case was made by an assistant district attorney (Pet. App. 2a n.1, 30a n.1).

stacked nearby (III R. 253-255). Petitioner Phillips, who had apparently been manning the "ground support" automobile, was arrested at a roadblock near the site where the marijuana had been found (*id.* at 310-311, 299-301). Petitioner Houltin was arrested along with co-defendants Burke, Francis and Morrison at the Columbus airport as they alighted from their airplanes. The arresting agents searched the planes and found marijuana debris in each of them (*id.* at 319-323).

After a jury trial, petitioners and their co-defendants were convicted and sentenced on both counts of the indictment.

2. On appeal, the court of appeals reversed petitioners' convictions, holding that petitioners had been arrested and the marijuana seized on the basis of information derived from the unlawful wire interceptions (Pet. App. 33a-41a).[3] The district court then set the case for retrial.

Prior to the second trial, the district court granted the government's application for immunity to the four co-defendants whose convictions had been upheld (IV R. 45-56). Petitioners then moved to dismiss the indictment, claiming that the Double Jeopardy Clause barred reprosecution following the reversal of their convictions (Pet. App. 37a; IV R. 41-44, 57-61).

[3] The court affirmed the convictions of co-defendants Burke, Croucher, Francis and Morrison, ruling that they lacked standing to challenge the legality of the interceptions since only telephone communications between petitioner Houltin and his wife and between Mr. Houltin and Mrs. Phillips had been intercepted (Pet. App. 31a-36a).

Petitioner Phillips also moved to suppress the testimony of the four co-defendants on the ground that their testimony and availability to the government was the fruit of the unlawful wire interceptions (V R. 24-25). The district court denied both motions. The court first concluded that the court of appeals had not intended to bar further prosecution of petitioners when it had remanded the case, and that retrial was therefore permissible. The court held in addition that because the investigating agents knew the identity of the four co-defendants from independent sources prior to the illegal wiretap, suppression of the co-defendants' testimony was not required (IV R. 70-71). Petitioners immediately appealed, but the court of appeals dismissed their appeals as interlocutory (VI R. 8).[4]

3. The case was then submitted to the district court on stipulated facts, including an agreement that the testimony of the four co-defendants would be the same as that of the government agents who had testified at the first trial (VII R. 27).[5] Petitioners were

[4] Under *Abney* v. *United States*, 431 U.S. 651, the district court's order denying petitioners' motion to dismiss on double jeopardy grounds would now be appealable in advance of trial.

[5] The parties also stipulated that on October 12, 1973, prior to the airplane flight to Mexico to obtain the marijuana, petitioner Houltin and co-defendant Croucher had met at an airport near El Paso, Texas, and had flown the airplanes used in the transaction to Columbus, New Mexico (VII R. 27). In addition, the government informed the court that between October 2, 1973, and October 12, 1973, government agents had

convicted as charged and were sentenced to consecutive terms of five years' imprisonment on each count and a special parole term of three years on count one and two years on count two. In addition, petitioner Houltin was fined $5,000 on each count, and petitioner Phillips was fined $2,500 on each count (VI R. 42-43).[6] A divided court of appeals affirmed (Pet. App. 1a-26a).

ARGUMENT

1. Petitioners contend (Houltin Pet. 5-7; Phillips Pet. 12-14) that without the evidence held inadmissible on their first appeal, there was insufficient evidence at their first trial to establish their guilt beyond a reasonable doubt. Therefore, they argue, their retrial was barred by the Double Jeopardy Clause. As the court of appeals noted, however, the reversal of petitioners' convictions was predicated not on the insufficiency of the evidence against them, but solely "upon a procedural defect in the trial court—the admission of evidence resulting from the illegal wiretaps" (Pet. App. 14a). Because the court of appeals did not reverse for evidentiary insufficiency, the retrial did not offend the Double Jeopardy Clause. *Burks* v. *United States*, No. 76-6528, decided June 14, 1978,

conducted visual surveillance of petitioners and co-defendants Burke and Morrison in the El Paso area (*ibid.*).

[6] On the government's motion, the district court subsequently dismissed count two of the indictment and vacated petitioners' sentences on that count.

slip op. 13. As this Court stated in *Burks* (slip op. 14):

> In short, reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, *e.g.*, incorrect receipt or rejection of evidence, incorrect instructions, or prosecutorial misconduct. When this occurs, the accused has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished [citation omitted].

Even if it is true, as petitioners assert (Houltin Pet. 6-7; Phillips Pet. 13-14), that without the evidence ruled inadmissible by the court of appeals, the evidence at their first trial would have been insufficient to sustain a conviction, that does not alter the essential character of the court of appeals' determination, which was limited to a finding of trial error—a defect wholly unrelated to the factual question of guilt or innocence. Cf. *United States* v. *Scott*, No. 76-1382, decided June 14, 1978, slip op. 15. There was clearly sufficient evidence to support petitioners' convictions at the first trial (see Pet. App. 15a n.6), even though some of it was later held inadmissible. Retrial after the reversal therefore did not offend the Double Jeopardy Clause.

2. Petitioners also contend (Houltin Pet. 7-8; Phillips Pet. 6-12, 14) that the stipulated testimony of their co-defendants should have been suppressed as the fruit of the unlawful wire interceptions. As both courts below determined, however, the co-defendants' testimony "came from a source independent of the illegal wiretaps. It is undisputed that the DEA agents knew the identity of the four co-defendants for several years before the illegal wiretaps" (Pet. App. 7a; see also IV R. 71). Because the government's discovery of these witnesses was independent of any statutory violation, their testimony was admissible against petitioners at trial. *Wong Sun* v. *United States*, 371 U.S. 471, 487; *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385, 392. The factual determination that the testimony was derived from a source independent of the unlawful wiretaps was concurred in by both courts below; review by this Court is therefore unwarranted. See *United States* v. *Ceccolini*, No. 76-1151, decided March 21, 1978, slip op. 4; *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635.

In any event, even if there were some causal connection between the illegal conduct and the challenged evidence, that connection would not require suppression on the facts of this case. Petitioners seek to exclude live-witness testimony because of a technical statutory violation by state law enforcement officers. Because the cost to society of excluding live-witness testimony is often greater than the cost of excluding tangible evidence, "the exclusionary rule

should be invoked with much greater reluctance where the claim is based on a causal relationship between a constitutional violation and the discovery of a live witness than when a similar claim is advanced to support suppression of an inanimate object" (*United States* v. *Ceccolini, supra,* slip op. 11-12). *A fortiori,* there is no reason for suppression when the violation is a technical statutory error.

As in *Ceccolini,* there is not the slightest evidence to suggest that the violation was intentional or that the state authorities committed the violation for the purposes of producing potential witnesses against petitioners. Similarly, as in *Ceccolini,* the witnesses were already known to law enforcement authorities prior to the violation. In light of the technical nature of the statutory defect in this case, "[t]he cost of permanently silencing [the witnesses] is too great for an even-handed system of law enforcement to bear in order to secure such a speculative and very likely negligible deterrent effect" (*United States* v. *Ceccolini, supra,* slip op. 11) and would thus be wholly disproportionate to the official misconduct. See *United States* v. *Calandra,* 414 U.S. 338, 348, 351; *Stone* v. *Powell,* 428 U.S. 465, 486.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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